



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-90-13

You are a professional engineer with state agency ABC (ABC). You also hold a license to operate wastewater treatment plants and you are seeking a part-time position as an operator of a municipal wastewater treatment plant outside of the ABC service area. The duties of a wastewater treatment plant operator include recording plant operations data, maintaining plant logs, collecting samples, performing basic lab analysis and operating and maintaining equipment.

Some of the municipal wastewater plants are operated under contracts with private companies, and some are run directly by the municipality. You are unsure whether you will accept a position directly with a municipality or with a private company. If you accept a position with a private company, you will not be named in the contract between the company and the municipality. Regardless of which entity employs you, you only intend to work on a part-time weekend basis outside of your regular ABC duties. You assume that your duties on a weekend shift would be limited to operating equipment, checking security, making minor equipment adjustments and obtaining lab samples.

### QUESTION:

1. Does G.L. c. 268A permit your proposed outside employment with a private company that operates municipal wastewater treatment plants?
2. Does G.L. c. 268A permit you to accept direct outside employment with a municipality at its wastewater treatment plant?

### ANSWER:

1. Yes, as long as you comply with the conditions set forth below.
2. Yes, as long as you do not act on any matter within the purview of the ABC.

### DISCUSSION:

As a full-time ABC employee, you are a state employee for purposes of the conflict of interest law, G.L. c. 268A, s.1(q). Accordingly, the provisions of G.L. c. 268A, s.4 apply to your outside employment.

#### 1. Private Company Employment

Section 4(a) prohibits a state employee from receiving compensation from anyone other than the commonwealth or a state agency in relation to any particular matter<sup>1/</sup> in which the commonwealth or a state agency is a party or has a direct and substantial interest. At issue is whether the Commonwealth has a direct and substantial interest in matters pertaining to the operation of municipal wastewater treatment plants. In past precedent, the Commission has found that where an agency exercises substantial regulatory authority and oversight of an

activity, the commonwealth will have a direct and substantial interest in the activity. See EC-COI-83-130 (state has direct and substantial interest in county corrections officer's activities due to substantial regulatory authority of Department of Corrections); 83-104 (activities of assistant medical examiner of direct and substantial interest); 82-68 (activities of local liquor licensing authorities of direct and substantial interest to ABCC).

The Commission concludes that the Commonwealth has a direct and substantial interest in many of the activities of treatment plant operators. Although the treatment plant is owned by a municipality, the operation and maintenance of all treatment plants is regulated by the Department of Environmental Protection (DEP). G.L. c. 21, s.34 ("division shall supervise the operation and maintenance of treatment works within Commonwealth") DEP requires a municipality to obtain a state permit for either surface water or groundwater discharge. G.L. c. 21, s.43; 314 CMR 3.00 - 5.00. The permit includes conditions for compliance with DEP and federal standards, monitoring by DEP and conditions for operation. See, e.g., 314 CMR 3.00 (9)(10)(11). DEP also performs inspections of treatment plants to monitor compliance and has regular monthly reporting requirements. 314 CMR 12.07. For example, DEP requires specific laboratory sampling and analysis for each facility. 314 CMR 12.06. Upon request, DEP may review septage discharge records, operating records, certain equipment failure records and monitoring instrumentation records. 314 CMR 12.07. Additionally, under G.L. c. 21, s.s.34A and 34B all wastewater treatment operators are required to obtain state certification "to insure the proper management, operation and maintenance of wastewater treatment facilities."

Because of this extensive regulation, the Commission concludes that wastewater treatment operator activities required pursuant to the DEP permit or necessary for DEP determination of plant compliance with DEP standards will be "in relation to" a particular matter in which the Commonwealth has a direct and substantial interest. These activities may include, but are not limited to, performing lab tests or analysis required by DEP, collecting data or other information to be incorporated into reports submitted to DEP, submitting reports directly to DEP, maintaining or adjusting equipment to comply with DEP standards for the facility, or recording plant operation data which may be reviewed by DEP. Therefore, you may not receive compensation from a private company if your responsibilities include matters to be reviewed or monitored by DEP or required by DEP.

On the other hand, some positions within the municipal wastewater treatment plant may not be "in relation to" the DEP permit or any DEP determination regarding plant compliance and, accordingly, would not violate s.4. In past precedent, the Commission has recognized that certain facts may overcome a presumption that all work done pursuant to a permit is in relation to that permit. See, EC-COI-88-9; 87-31. In EC-COI-87-31, the Commission concluded that a municipal official could not be paid privately to install septic systems because the installation was in relation to the septic permit and subsequent inspection. We held that where the official operated his own septic business and was the only installer on the job, there was a presumption that the work he performed was in relation to the permit. In that opinion, however, we recognized that certain facts may overcome the presumption that all work done pursuant to a permit is in relation to the permit.

For example, a municipal employee, who is one of many privately paid employees or independent contractors on a major construction project, and who has no responsibility for dealing with the town on any matter, might not be considered to be privately compensated "in relation to" the permit which allows the construction. Furthermore, certain permits which authorize a major construction project (e.g., a zoning municipal

reuse permit to convert a school building into condominiums) will not necessarily render all work done on the project, e.g., interior painting, 'in relation to' the permit.

Applying the principles to your circumstances we conclude that if your duties with the private company were limited to such matters as internal plant security, maintenance of the plant grounds or mechanical equipment repairs, then you would not be receiving compensation in connection with a particular matter in which the Commonwealth has a direct and substantial interest because these matters are incidental to the DEP permit, standards and regulations.<sup>2/</sup>

## 2. Direct Municipal Employment

You indicate that you are also considering direct employment with a municipality that operates its own treatment plant without outside contracts. As the Commission has concluded above, the receipt of compensation as a wastewater treatment operator from anyone other than the Commonwealth in relation to matters pertaining to the DEP permit or DEP compliance will generally violate s.4. However, when a state employee holds employment with a municipality, not a private entity, the prohibition of s.4 is less restrictive. See, EC-COI-90-8; 90-4. In a 1980 amendment to s.4, the Legislature provided that:

This section shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties or receiving compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.

This exemption would permit you to accept direct employment with a municipality as long as the municipality is not in the ABC service area. If the municipality is within the ABC service area, this exemption will significantly restrict your activities because virtually every matter would fall within the purview of the agency by which you are employed.

In conclusion, "s. 4, prohibiting assistance to outsiders, is the essence of conflict of interest legislation. It says, in effect, that the norm of government employment is that the regular public employee should, in the usual case, be a public employee first, last and only. For him to be also a private employee is a contradiction in terms: it suggests that he is serving two masters." Buss, The Massachusetts Conflict of Interest Statute: An Analysis, 45 B.U.L. Rev. 299, 322 (1965). If you received compensation from a private entity in connection with a matter in which the Commonwealth has a direct interest, your loyalties would be impermissibly split between the Commonwealth and the private company. Therefore, you may not receive private compensation in connection with being a treatment plant operator if your responsibilities include matters pertaining to the DEP permit or compliance standards. You may work directly for a municipality outside of the ABC service area because the Legislature recognized that a state employee who also serves in a municipal capacity will continue to serve the public interest.

**Date Authorized:** September 12, 1990

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<sup>1</sup> "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties

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and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, s.1(k).

<sup>2</sup> This opinion will require you to scrutinize the responsibilities for each position to which you apply. This opinion is based only on the facts that you have presented. If the facts change, you should seek further guidance from the State Ethics Commission.